THE COURT: I have before me an objection to a proof of claim, Claim No. 239, submitted by Statek Corporation ("Statek") in this Chapter 11 case. The objection is brought by the plan administrator under Coudert Brothers LLP's Chapter 11 plan, which was confirmed some time ago and gives the administrator the authority to object to proofs of claim. The claim was originally filed on behalf not only of Statek but also Technicorp International II Inc. ("TCI-II"). However, since the time I permitted the automatic stay to be lifted to permit the claimants to amend their complaint against Coudert Brothers that underlies the proof of claim (and that was attached to the proof of claim), the complaint was amended to delete TCI-II as a plaintiff. Therefore, at this point Statek is the only claimant.

As a proceeding involving the allowance or disallowance of a claim, this is a core matter under 28 U.S.C. § 157(2)(b).

A claim objection is a contested matter under the Bankruptcy Code; however, as I informed the parties to this proceeding last week, given the nature of the claim and the objections to it, I have incorporated under Rule 9014 the adversary proceeding rules to this claim objection. More specifically, I am treating the plan administrator's present filing in support of his claim objection as a motion to dismiss under Fed.R.Civ.P. 12(b)(6), which is incorporated by

Bankruptcy Rule 7012.

The parties previously agreed to go to mediation on this claim, and I was informed after the mediation apparently had proceeded for some time that they and the mediator believed that certain issues that are now before me should be addressed at this time so that the Court's review of those issues might assist them in the successful completion of the mediation. That request also led me to treat this particular aspect of the matter as one that I should decide under Rule 12(b)(6), in that it's clear that the parties have not completed discovery and that it would be extraordinary, and I think improper, to go beyond the 12(b)(6) framework in that context. That request has also influenced me to be somewhat more expansive in discussing alternative grounds for my ruling, in the belief that the parties' positions in the mediation may be further developed in the light of such dicta.

The Court when considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6) must assess the legal feasibility of the complaint, in this case the amended complaint attached to Statek's proof of claim, and not weigh the evidence that might be offered in its support. Koppel v. 4987 Corp., 167 F.3d 125, 133 (2nd Cir. 1999). The Court's consideration "is limited to facts stated on the face of the complaint and in the documents appended to the complaint or incorporated in the complaint by reference as well as to matters of which judicial notice may be

taken." Hertz Corp. v. City of New York, 1 F.3d 121, 125 (2nd Cir. 1993). The Second Circuit recognizes incorporation by reference of contracts and/or agreements that are integral to the complaint even if they are not attached thereto for purposes of Rule 12(b)(6). See Chambers v. Time-Warner Inc., 282 F.3d 147, 152 (2nd Cir. 2002).

The Court accepts the complaint's factual allegations as true, even if doubtful in fact, and must draw all reasonable inferences in favor of the plaintiff. Tellabs Inc. v. Makor Issues and Rights Ltd., 127 S.Ct. 2499, 2509 (2007). However, if a claimant's allegations are clearly contradicted by documents incorporated into the pleadings by reference, the Court need not accept them. Labajo v. Best Buy Stores, L.P., 478 F.Supp. 2d 523, 528 (S.D.N.Y. 2007). Moreover, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). Instead, the complaint must state more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do. Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007). Further, while the Supreme Court has confirmed, in light of the notice pleading standard of Federal Rule of Civil Procedure 8(a), that a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations to survive, Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007), a complaint's "factual allegations must be enough

to raise a right to relief above the speculative level." Bell Atlantic, 127 S.Ct. (1964). Where the claim would not otherwise be plausible on its face, therefore, the complaint must contain sufficient additional factual allegations to "nudge the claim across the line from conceivable to plausible." Id. at 1974. Otherwise, the defendant, in this case the debtor, should not be subjected to the burden of continued discovery and the worry of overhanging litigation. Id. At 1965-67. See also Ashcroft v. Iqbal, 129 S.Ct. 1937, 1945-50 (2009)(the "two working principles" underlying Rule 12(b)(6) are (1) "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and (2) "only a complaint that states a plausible claim for relief survives a motion to dismiss," and "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show(n)'– "that the pleader is entitled to relief").

In addition to objecting to Statek's claim on the merits under Rule 12(b)(6), the plan administrator objects on the basis that the claim is time barred under New York's borrowing statute, as well as, if that borrowing statute does not apply, the applicable underlying statute of limitations.

A statute of limitation defense can be raised under Rule 12(b)(6), but the circumstances under which it may be

raised are limited by the nature of a 12(b)(6) motion. Normally, a lapse of a limitation period is an affirmative defense that the defendant must plead and prove. Staehr v. Hartford Financial Svcs. Group, Inc., 547 F.3d 406, 425 (2d Cir. 2008). However, "a defendant may raise an affirmative defense in a pre-answer Rule 12(b)(6) motion if the defense appears on the face of the complaint." Id. (citing McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004)). See generally 5 Wright & Miller Federal Practice and Procedure § 1357. A complaint showing that the governing statute of limitations has run on the plaintiff's claim for relief is the most common situation in which the affirmative defense appears on the face of the pleading and provides a basis for a motion to dismiss under Rule 12(b)(6). (Because Rule 9(f) makes averments of time material, the inclusion of dates in the complaint indicating that the action is untimely renders it subject to dismissal for failure to state a claim.) Of course, the defendant moving in a 12(b)(6) posture on the basis that a claim is time barred "must accept the more stringent standard applicable to this procedural route;" not only must the facts supporting the defense appear on the face of the complaint, but, as with all Rule 12(b)(6) motions, the motion may be granted only if the movant satisfies the general 12(b)(6) standard, discussed above. See McKenna, 386 F.3d at 436. For example, if a plausible factual basis is apparent for tolling a

time bar or for applying a different period that would permit the claim to proceed, the motion should be denied.

Here, as I noted, the plan administrator objects to Statek's proof of claim, as set forth in the amended complaint that Statek filed on August 29, 2008, on both the merits and on grounds of untimeliness. The nature of Statek's claim was either clarified, or further reduced, or minimized in Statek's response to the plan administrator's objection. The complaint itself has only one cause of action, headed with the caption "breach of professional and fiduciary duties." Statek's response to the plan administrator's objection, as well as Statek's counsel's presentation at the hearing, have made it clear that at this time, and going forward, the only breach of a fiduciary duty continued to be asserted by Statek is Coudert's relatively minor alleged failure to account for its $43,557.47 disbursement of alleged Statek funds out of its U.S. dollar account. Statek no longer claims, if it ever did, that Coudert withheld files from Statek in breach of its fiduciary duty to provide them, which fact pattern is alleged to have caused by far the greater amount of Statek's claimed damage. See Statek's Memorandum of Law in Opposition to the administrator's claim objection, at page 42.

Thus, at this time Statek has clarified that its claim (except for Coudert's alleged failure to account for $43,557.47) is one only for breach of care, malpractice or

negligence, all stemming from the following fact pattern: as alleged in the amended complaint, Statek and its parent, TCI-II, were originally under the control of an individual named Hans Frederick Johnston, as well as Johnston's associate Sandra Spillane, who had assumed the position of Statek's and TCI II's directors. According to the complaint, they retained Coudert Brothers LLP through its UK office for certain legal services, which Coudert billed to Statek. Other individuals asserting an interest in the ownership and control of Statek and TCI-II, however, pursued those interests in Delaware Chancery Court and eventually obtained a determination by the Delaware Chancery Court pursuant to § 225 of the Delaware General Corporation Law that, indeed, Johnston and Spillane were not the lawful directors of TCI-II or Statek and that, instead, they should be replaced by the people who currently control TCI-II and Statek.

Upon Johnston and Spillane's ouster in the § 225 action, two things occurred. First, starting in January of 1996, Statek through its counsel sought certain information from Coudert (among others) relating to Johnston and Spillane – specifically, from Coudert, information about the services Coudert provided at Johnston's or Spillane's request -- as well as instructed Coudert not to transfer any funds that it was holding for Statek without proper authorization, having informed Statek of the ruling in the § 225 action. Second, on June 26, 1996, Statek and TCI II commenced an action in

Delaware state court against Johnston, Spillane and entities owned or controlled by them asserting claims of fraud, breach of fiduciary duty, and corporate waste for the period they had been in control. In July of 1996, then, Statek notified Coudert that it had commenced the fraud and waste action and, as set forth in paragraph 28 of the amended complaint, "asked Coudert to provide information and a complete copy of the files arising out of and relating to the services Coudert had rendered," which the amended complaint attached to Statek's proof of claim defines as the "Statek files."

The amended complaint asserts that Coudert provided some information in response to Statek's request, including sending Statek six files related to the services it had rendered in setting up a subsidiary known as Statek Europe Limited and in assisting with a lease of a London apartment that was used by Johnston. Paragraph 30 of the amended complaint states that Coudert also confirmed that it had no other "Statek files" or information about other "Statek services" it had rendered. The amended complaint then states that, contrary to the confirmation it provided to Statek, Coudert, in fact, had, but did not provide or disclose, additional "Statek files" and information regarding other "Statek services" that it had rendered, including the four types of services listed in paragraph 31: assistance to Johnston in setting up an asset protection trust in the Jersey

Channel Islands used by Johnston and Spillane, assistance in setting up a bank account and arranging for safe deposit boxes in the name of an asset protection trust, advice relating to a house in Nassau, Bahamas that Johnston and Spillane had purchased, and advice and assistance relating to purchasing, shipping and storing art and stamps that Johnston and Spillane acquired (with the use, Statek alleges, of funds allegedly misappropriated from Statek).

The amended complaint asserts that Coudert provided this subsequent information to Statek only over the course of several more years, and, indeed, even now may not have provided Statek all such information. Paragraph 36 of the amended complaint states that "for reasons unknown to Statek...Coudert did not provide Statek with complete and accurate information about the Statek services or the contents of all of its Statek files, either when first requested in July 1996 or at any time since."

The amended complaint goes on to state that after obtaining a judgment in the Delaware fraud and waste action in September 2000 (after the Delaware court issued a lengthy opinion in that action on May 31, 2000), Statek pursued its remedies against Johnston and Spillane and their controlled entities.

As noted in paragraphs 18, 19, and 21 of the amended complaint, the May 31, 2000 opinion stated, "the task of

proving [Johnston and Spillane's] diversions of funds [from Statek] was daunting because many of the expenditures were either inadequately documented or not documented at all," and, further, that "Mrs. Spillane moved money in huge amounts to Johnston [Entities] and back to Statek and back out of Statek with an elan and skill of a drug cartel consigliore. This money moves at the speed of light and in huge amounts."

Statek alleges that it pursued the collection of its fraud and waste action judgment in various ways, which included commencing an insolvency proceeding against Johnston in the Supreme Court of Judicature of England and Wales pursuant to the 1986 Insolvency Act. The amended complaint then states that, after the involuntary petition was filed on July 11, 2002, an English trustee was appointed on October 2, 2002 and by letter to Coudert dated October 22, 2002 sought files and documents from Coudert related to Johnston and to any assets that should be included in Johnston's bankruptcy estate (which clearly was appropriate given the findings of the Delaware Court, quoted above, in the fraud and waste action). That led, as set forth in the amended complaint, to a back and forth exchange between Coudert and the English trustee over whether Coudert had information in addition to that which Coudert had previously provided to Statek. On November 4, 2002, however, the trustee obtained information from Coudert in addition to the information previously provided by Coudert to Statek:

primarily information concerning advice regarding the art collection that Johnston had wanted to bring to Europe.

On December 12, 2002, the English trustee wrote to Coudert, stating "it is my understanding that you assisted the bankrupt with numerous affairs, and I shall therefore be grateful if you would provide me with copies of your fee notes in relation to the bankrupt and Statek in order that I can establish the exact nature of the advice provided." And then, when the English trustee felt that he was frustrated by Coudert in this matter, in June 2003 he commenced an ancillary proceeding under former section 304 of the Bankruptcy Code in the Bankruptcy Court for the District of Connecticut to assist him in obtaining more information. As a result, Coudert produced more files, including details of Coudert's assistance in setting up the Channel Islands trust.

Based on all of the foregoing, Statek alleges that Coudert breached its professional duty of care to it by failing to provide Statek with all of the "Statek files," failing to disclose to Statek all of the information of which it was aware about "Statek's matters" and "Statek services," and failing to account for Statek's funds that it disbursed from its accounts, all as encapsulated in paragraph 36 of the complaint, which, again, states, "for reasons unknown to the plaintiff Coudert did not provide Statek with complete and accurate information about the Statek services or the contents of all of its Statek

files either when first requested in July 1996 or any time since."

Statek contends that it was damaged by Coudert's failure to timely provide files and information, which delayed and hampered Statek's discovery recovery of assets that Johnston and Spillane had misappropriated, as well as increasing the cost of recovering such assets (to the extent that they were still recoverable). Based on all of the foregoing, the proof of claim asserts that Coudert owes Statek $85 million.

On the merits, the plan administrator contends that the foregoing facts fail to state a claim for professional malpractice or negligence. The underlying premise for Statek's claim, as I stated, was somewhat uncertain until clarified, first, in Statek's response to the claim objection, as well as on the record of this hearing. Statek originally appeared to be asserting a breach of fiduciary duty claim, and, even after the clarification in its memorandum in opposition to the claim objection, Statek continued to rely upon an English decision, Bristol & West Building Soc. v. Mothew, 1998, Ch 1, Ct. of Appeal, where professional negligence was conceded by the defendant and the English court focused on breach of fiduciary duty, which thus suggested that Statek was pursuing a breach of fiduciary duty claim (consistent with the heading of its one cause of action) and not a malpractice claim (which the amended

complaint nowhere expressly asserts).

For that reason, the plan administrator contends that Statek has not asserted a claim for negligence or professional malpractice. The labels or conclusions that a claimant places on the facts asserted in its complaint are of no import, however. The Court must, instead, review the factual assertions set forth in the complaint to determine whether the complaint states a claim. Newman v. Silver, 713 F.2d 14, 15 n.1 (2d Cir. 1983); see also Tolle v. Carrol Touch, Inc., 977 F.2d 1129, 1134 (7th Cir. 1992); 2 Moore's Federal Practice ¶ 8.04[3], 8-33-34 (3d ed. 2008).

Further confusion arises from the fact that it is not clear from the face of the amended complaint what exactly is meant by the phrase "Statek files" or the phrase "Statek services," whether, for example, those phrases encompass not only Statek's files and services provided by Coudert to Statek but also files of Johnston and Spillane individually or of their other entities and services provided by Coudert to Johnston and Spillane individually. However, the amended complaint does on its face allege that Coudert provided services directly to Statek, although it does not specify what those services were, and the defined terms "Statek services" and "Statek files" could be read to include services provided to Statek, instead of to Johnston and Spillane, and Statek's own files, instead of Johnston and Spillane's, respectively.

Given that, and given the allegation in the amended complaint that, notwithstanding a request by Statek for return of such files and information pertaining to such services, Coudert did not timely provide such files or information, I believe that the complaint does state a claim for professional malpractice or negligence, in that it alleges that such files and information were in Coudert's possession and were not, when Statek's requests were made in 1996, returned to Statek but, rather, were returned only later in 2002 and 2003. It is conceivable, certainly, that the files and information that were not returned were not Statek's own files or information pertaining to a Statek representation by Coudert and, consequently, that Coudert did not have an obligation under its professional duty of care to Statek to provide it with such files and information. It is also possible even if the files were Statek's files and Coudert delayed providing information pertaining to services Coudert provided to Statek that Coudert was not negligent in doing so. But I believe that those issues are properly to be decided after an evidentiary record has been developed and not on a motion to dismiss. Thus it appears to me that the amended complaint states a claim for professional malpractice or negligence based on Coudert's alleged failure to return the client's files after the client so requested.

Statek also asserts that the relatively minor amount of $43,557 was lost by Coudert not only as a result of its

negligence, but also based on an asserted breach of fiduciary duty. However, from the face of the amended complaint I can see no basis for a breach of fiduciary claim with regard to Coudert's alleged failure to turn over such funds. The amended complaint does not allege that such funds were client trust funds or entrusted by Statek with Coudert to be held and maintained separately. So, on the merits, Coudert's motion to dismiss is denied insofar as the professional malpractice and/or negligence claims asserted in the amended complaint are concerned but granted with regard to the remaining breach of fiduciary duty claim which pertains to the roughly $43,000 of funds that were not retained by Coudert that were allegedly Statek's funds.

The plan administrator is also, as I noted, objecting to Statek's claim on the basis that it is time barred. There are two underlying grounds for this objection.

First, the plan administrator contends that the claim is time barred by operation of New York's borrowing statute, New York CPLR § 202. Statek acknowledges that, if New York's borrowing statute applies to this matter, its claim is, indeed, time barred.

In addition, even if the New York borrowing statute does not apply, the plan administrator contends that under any statute of limitation that is plausibly applicable under applicable choice of law principles, the claim would also be

time barred. Again, Statek concedes that if New York law applies, that is, if New York's underlying, substantive law applies here, its claim would be time barred. It also concedes at Page 45 of its memorandum of law in opposition to the claim objection that if California law applies, its claim would be time barred. Statek disagrees with the plan administrator that if Connecticut law applies its claim would be time barred, however, as it does with the plan administrator's contention that if English law applies the claim would be time barred.

The first issue to decide, then, is whether the Court should apply New York choice of law principles to decide the foregoing issues or, alternatively, whether it should apply some other choice of law -- more specifically, whether, as Statek contends, federal choice of law principles should control. That inquiry applies both to whether the Court should apply the New York borrowing statute and to the applicable statute of limitations if New York's borrowing statute is not to be applied.

The underlying jurisdictional basis for this claim is the Court's bankruptcy jurisdiction under 28 U.S.C. section 1334. The claim here clearly is "related to" Coudert's bankruptcy case in that it is a claim asserted against the debtor, Coudert. As I noted before, the Court's determination of the claim is a core proceeding under 28 U.S.C. section 157(a)(2)(B).

It has long been the rule that in cases where a federal court's jurisdiction is based on diversity the court must apply the choice of law rules of the state in which it sits. Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). The underlying rationale for that proposition is that to apply a different law than the law of the state in which the court sits would mean that "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." Id. at 496.

Although there was dicta in the Second Circuit dating back to Kalb, Voorhis & Company v. Amer. Fin. Corp., 8 F.3d 130, (2d Cir. 1993), and, even before then, to Koreag, Controle Et Rivision SA case, 961 F.2d 341, (2d Cir. 1992), the Second Circuit did not directly address whether it would apply Klaxon to determinations by a bankruptcy court exercising bankruptcy jurisdiction until another law firm bankruptcy case, In re Gaston & Snow, 243 F.3d 599 (2d Cir. 2001), cert. denied, 534 U.S. 1042 (2001). In that case, there was no basis for federal jurisdiction but for the fact that Gaston and Snow's Chapter 11 case was pending in the bankruptcy court (and the defendant in that case's voluntary submission to the in personam jurisdiction of the court).

As is also asserted in the present dispute, in Gaston & Snow, New York's borrowing statute, CPLR § 202, was, if it

applied, dispositive or determinative of the ability of the action to continue. Id. at 605. Other than the fact that the dispute was pending in New York as a result of Gaston & Snow's bankruptcy, New York choice of law principles would not have called for the application of substantive New York law, given the interests of the parties: Gaston & Snow was a Massachusetts law firm with only a branch office in New York and the underlying breach, if it occurred, took place in either Massachusetts or Idaho, where the defendant resided.

The Court of Appeals considered whether New York's borrowing statute should apply, as would be required under Klaxon if jurisdiction had been based on diversity or, instead, whether, as urged by the defendant, federal choice of law principles should have precluded the application of the law of New York, where the court sat. Id. at 605-607.

It was argued to the Second Circuit, consistent with some case law in other jurisdictions, including In re Lindsay, 59 F.3d 942 (9th Cir. 1995), and In re SMEC Inc., 160 B.R. 86 (M.D. Tenn. 1993), that the Court's exercise of its bankruptcy jurisdiction required a uniform federal choice of law approach, notwithstanding Klaxon. Id. at 606-607. Statek makes the same arguments here. However, after considering those arguments, the Second Circuit concluded, to the contrary, that the logic and policy underlying Klaxon should apply when a federal court exercises bankruptcy jurisdiction as well as diversity

jurisdiction, and, therefore, that the law of the state in which it sat, New York, should apply, including its borrowing statute, id. at 606-607, which, the Court noted, would be applied by New York courts regardless of any other applicable choice of law considerations that would otherwise call for a different choice of law. Id. at 608 ("CPLR 202 is in the nature of an exception to the normal New York conflicts rule of applying the law of the jurisdiction with the most significant contacts....Modern choice-of-law decisions are simply inapplicable to the questions of statutory construction presented by CPLR 202. CPLR 202 is to be applied as written, without recourse to a conflict of law analysis.")(internal quotations and citations omitted).

The Second Circuit fully considered the constitutional and policy arguments to the contrary -- for example, that there is some potential for forum shopping that would arise from the application of Klaxon in the bankruptcy context, and that, because the bankruptcy court deals with claims filed from many locations, it should apply uniform federal rules to claim objection litigation.

The Gaston & Snow Court noted, however, that under the Supreme Court jurisprudence it could apply federal choice of law principles only in those few and restricted instances where "[a] significant conflict between some federal policy or interest and the use of state law must be first specifically

shown." 243 F.3d at 606; See also O'Melveny & Meyers v. FDIC, 512 U.S. 79, 87 (1994); Atherton v. FDIC, 519 U.S. 213, 218 (1997). This is because "the ability of the federal courts to create federal common law and displace state created rules is severely limited." In re Gaston & Snow, 243 F.3d at 606.

The Second Circuit found no such conflict with a federal policy or interest, given that the underlying claim was a state law claim and the objection to it was based also on state law, non-bankruptcy grounds, even though the litigation could not have been brought in federal court on alternative diversity grounds. Id. at 607. It contrasted those facts with the facts in Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946), where a federal interest did exist given the Bankruptcy Act of 1898's disallowance of claims for compound post-bankruptcy interest (the disputed claim there at issue), which overrode applicable non-bankruptcy law. Statek's claim and the plan administrator's objections to it, like the claims at issue in Gaston & Snow, are similarly based not on the Bankruptcy Code but on applicable non-bankruptcy law. Id.

In addition to the arguments that the Second Circuit specifically rejected in Gaston & Snow, Statek makes two other arguments, premised upon an asserted distinction between the facts in Gaston & Snow and the present facts. Gaston & Snow was a collection action, in an adversary proceeding by Gaston & Snow's trustee, of a bill for legal services, although there

also was a counterclaim against the debtor by the former client. Id. at 603-604. The action here is a claim objection where the Court is exercising its core function in determining the allowability of a claim. Relying largely on dicta in Vanston, Statek suggests that the federal policy in having a uniform approach to choice of law in the claim objection context is stronger than in the adversary proceeding collection action context of Gaston & Snow. Statek also relies upon the Supreme Court's ruling in Virginia Community College v. Katz, 546 U.S. 356 (2006), to argue that the Supreme Court has reaffirmed and strengthened the importance of the uniform administration of the bankruptcy laws since Gaston & Snow .

I do not believe, however, that either the dicta in Vanston relied upon by Statek or the holding in Katz would result in any change here from the result in the Gaston & Snow case.

Again, the Vanston case is, I believe, properly viewed as a preemption case, where there was clearly a strong federal interest in applying federal law to all of the aspects of the determination of the allowability of post-petition interest for an unsecured claimant, given that the Bankruptcy Act of 1898 disallowed claims for post-petition interest by unsecured creditors (with a judge-made exception in instances where the debtor proved to be solvent). Because the Bankruptcy Act had a specific provision dealing with that specific claim,

it was not a claim to be decided under applicable non-bankruptcy law principles, and, therefore, federal law properly governed its resolution.

Similarly, the equitable subordination action in In re Lois/USA, 264 B.R. 65 at 90 (Bankr. S.D.N.Y. 2001), cited by Statek, involved a specific provision of the Bankruptcy Code, Section 510(c), which by its very nature as a federal statute has a federal purpose requiring the application of federal law. Moreover, of course, any litigation involving a debtor often, as in Gaston & Snow, 243 F.3d at 603, involves counterclaims raising serious doubts whether a valid distinction can be made, as Statek suggests, between actions by a debtor or its trustee to enforce claims of the debtor and objections to claims against the debtor.

I also do not believe that Central Virginia Community College v. Katz, 546 U.S. 356 (2006), expanded the concept of a uniform bankruptcy law to cover the applicable choice of law when one is dealing with an objection to a proof of claim based upon and governed by applicable non-bankruptcy law. At issue in Katz was whether Article 1, Section 8 of the Constitution, which gave Congress the power to establish uniform laws pertaining to bankruptcy, would trump a state's assertion of sovereign immunity. Again, the issue in Katz was clearly one of preemption, where a clear federal interest expressed in the Constitution’s bankruptcy clause butted up against the states’

interest in sovereign immunity. However, because the plan administrator's objection to Statek's claim, as is the case with most claim objections, is not dependent on or premised upon a specific provision of the Bankruptcy Code that, as a matter of federal law, would limit the claim (such as Bankruptcy Code §§ 502(b)(2), 502(b)(6) or 510(c)), but is, rather, to be determined under the applicable underlying non-bankruptcy law, there is no overriding federal interest that would rise to the level required by the O'Melveny & Meyers and Atherton cases, or by the Second Circuit in Gaston & Snow.

The claim here could have been brought outside of bankruptcy, i.e., if this bankruptcy case had not intervened, in any number of forums, state and federal. It could have been brought in New York, Coudert's headquarters, it could have been brought in England, it could have been brought in California, where Statek is incorporated, in each case assuming that there was a basis for in personam jurisdiction as well as for federal jurisdiction premised on the parties' the diversity or on some other non-federal jurisdictional basis. (It was, in fact, originally brought in state court in Connecticut, removed on diversity grounds to the U.S. District Court for the District of Connecticut and remanded on consent of the parties to Connecticut state court, from which it was removed to this Court). But, given the fact that Coudert's bankruptcy case is here in New York, it is consistent with Klaxon and Gaston &

Snow that this Court should apply New York's choice of law rules rather than stretching to find a federal rule to apply to a litigation that could have been brought outside of bankruptcy in several different places. See also In re Merritt Dredging Co., 839 F.2d 203, 206 (4th Cir. 1988), Cert. denied, 487 U.S. 1236 (1988)(claim where federal court would have diversity jurisdiction, but for bankruptcy case, governed by Klaxon). The issue of whether there is any taint of forum shopping in applying those rules I believe at least is as much, if not more, of a red herring here as it was in the Gaston & Snow case. See 243 F.3d at 606. Coudert was a New York LLP with its primary office in Manhattan. Clearly, the venue of this Chapter 11 case is proper. Moreover, I can take judicial notice of the multitude of claims asserted against Coudert which would lead me to conclude that Coudert's Chapter 11 filing in Manhattan was not motivated by trying to obtain a favorable statute of limitations for this particular claim objection.

Therefore, I do not believe that Gaston & Snow is distinguishable or that it should be viewed in a different light and subject to reconsideration or that it would ultimately be reversed in light of Katz. As the plan administrator points out, moreover, after Katz, courts sitting in bankruptcy or exercising their bankruptcy jurisdiction in the Second Circuit have continued to apply the choice of law

principles of their forum state. See In re Suprema Specialities, Inc., 285 Fed. Appx. 782, 2008 U.S. App.LEXIS 13813 at 3 (2d Cir. July 1, 2008); Bondi v. Grant Thornton Int'l, 2007 US Dist. LEXIS 11767 (S.D.N.Y. Feb. 22, 2007); In re Enron Corp., 357 B.R. 3252 (Bankr. S.D.N.Y. 2006).

Given the legal conclusion that I should look to New York law, I also conclude, as did Gaston & Snow, that New York CPLR § 202, New York's borrowing statute, applies. It applies by its plain terms, moreover, as drafted, even if under New York choice of law principles, New York choice of law would generally lead to another state's, or nation's, choice of law being applied for other purposes. In re Gaston & Snow, 243 F.3d at 608. See also Ledwith v. Sears Roebuck & Co., Inc., 660 N.Y.S.2d 402, 406 (N.Y. App. Div. 1997); Gorlin v. Bond Richman & Co., 706 F. Supp. 236 (S.D.N.Y. 1989); Baena v. Woori Bank, 2006 U.S. Dist. LEXIS 74549 (S.D.N.Y. Oct. 11, 2006). That is, courts sitting in New York must apply New York's borrowing statute before exploring any other choice of law analysis. If the borrowing statute would bar the claim, that is the end of the matter. In re Gaston & Snow, 243 F.3d at 608.

As noted, it is conceded, as it must be, given the facts here, that New York's borrowing statute would bar Statek's claim: the shorter limitations period under New York law applies, and that limitations period would defeat Statek's claim. Therefore, the plan administrator's objection is

granted on a 12(b)(6) basis based on the applicability of New York CPLR § 202.

The plan administrator has also argued that even if I did not apply the New York borrowing statute and instead applied federal choice of law principles, the resulting applicable law would be the law of New York, leading, once more, to the disallowance of Statek's claim as time barred. Considering § 142 of the Restatement (Second) Conflict of Laws ("Restatement"), which the parties rely upon as articulating federal choice of law principles (it is worth mentioning that this highlights the undeveloped nature of federal choice of law analysis in light of Klaxon's direction to look to the law of the state in which the federal courts sit), it appears to me that New York law should apply here under such principles to time bar the claim. That section says that, "Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6 [incorporated in Restatement § 145]. In general, unless the exceptional circumstances of the case make such a result unreasonable: (1), the forum will apply its own statute of limitations barring the claim," which, as I've noted above would be the case here under the law of New York where the Court sits. Restatement § 142. "The forum will apply its own statute of limitations permitting the claim unless maintenance of the claim would serve no substantial interest of the forum

and the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence." Id. (emphasis added). Statek, to the contrary, wants the Court to apply a statute of limitations from another forum that would permit the claim. Therefore, that alternative would not apply.

Comment f to § 142 does state, "There will be rare situations when the forum will entertain a claim that is barred by its own statute of limitations but not by that of some other state. Thus, the suit will be entertained when the forum believes that, under the special circumstances of the case, dismissal of the claim would be unjust. This may be so when through no fault of the plaintiff an alternative forum is not available as, for example, where jurisdiction could not be obtained over the defendant in any state other than that of the forum or where for some reason the judgment obtained in any other state having jurisdiction would be unenforceable elsewhere." This exception, which is an extraordinary one, would not apply here, however. As noted, this litigation could have been brought in many places, but it clearly and appropriately could have been brought in New York, Coudert's headquarters and the place in which the leading Coudert lawyer on the Statek-related matters worked for some of the period at issue. It also could have been brought in California, Statek's state of incorporation, but Statek acknowledges that the claim

would be barred by California's statute of limitations. It was originally brought in Connecticut, but neither side has made a case for Connecticut law applying under an interests analysis. Finally, it could have been brought in England, but it was not. Under those circumstances, it would not be extraordinary or especially unjust to apply New York law, including New York's borrowing statute, under Restatement § 142.

If for some reason New York's borrowing statute and limitations period did not apply, however, I do have the belief that under New York choice of law principles, the paramount interest of England in regulating English attorneys and malpractice claims against English attorneys (recognizing that the attorneys who allegedly committed the malpractice and/or negligence where English solicitors, even if the lead attorney, as noted, worked out of New York for much of the period at issue) would override the normal New York choice of law analysis to lead the Court to apply the English limitations period (which normally would primarily look at the place of the wrong, or the locus of the tort and the location of the parties. See Krock v. Lipsay, 97 F.3d 640, 645 (2d Cir. 1996). Here, the injured party being a California Corporation and the debtor being a New York LLP, under the general New York choice of law rules, one would apply California law.)

But there is an exception, I believe, under the New York jurisprudence regarding New York's interest analysis that

deals with malpractice claims against attorneys, where the state where the attorneys are licensed and are practicing has a paramount interest in regulating the conduct of its own attorneys. See Diversified Group. Inc. v. Daugerdas, 139 F.Supp.2d 445, 453 (S.D.N.Y. 2001), as well as LNC Investments, Inc. v. First Fidelity Bank NA, 935 F.Supp. 1333 (S.D.N.Y. 1996). See also Engelke v. Brown, Rudnick, Berlack, Israels, LLP, 824 N.Y.S.2d 753 (N.Y. Sup. Ct. 2006), rev'd on other grounds, 845 N.Y.S.2d 260 (N.Y. App. Div. 2007).

Based on that analysis, English law should govern if one gets to the merits, including the subsequent choice of law analysis if for some reason New York's borrowing statute and statute of limitations would not apply. (Again, as stated in Ledwith and Gaston & Snow, the proper view is that a choice of law analysis does not pertain at all to whether the New York borrowing statute applies since that statute applies at all times, regardless of choice of law; and, as discussed above, under federal choice of law principles it appears that the new York state of limitations would apply.)

Under English law, the plan administrator contends that Statek's claim also is time barred. There is, however, a statutory exception to the six year English statute of limitation running from the date of the injury (which would be in 1996 and clearly would result in barring the claim here). That is the limitation found at Section 14 of the Limitation

Act of 1980, which provides in Section 14(a)(4) that the limitation period shall be either (a) six years from the date on which the cause of action accrued or (b) three years from the "starting date" as defined by Subsection 5 if that period expires later than the six-year period. The "starting date" is, as defined in Section 5, under Section 14(a) of the Limitation Act of 1980, "[t]he earliest date on which the plaintiff or any person in whom the cause of action was vested before he first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action." Sections 6 and 7 then continue, "[t]he knowledge required for bringing an action for damages in respect of the relevant damage means knowledge both of the material facts about the damage in respect of which damages are claimed and of the other facts relevant to the current action mentioned in Subsection 8 below." Subsection 8 states, "the other facts referred to in subsection (6)(b) above are that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence."

This Act was the subject of a lengthy series of opinions by the House of Lords appearing in Haward v. Fawcetts, [2006] UKHL 9 [2006], 3 All ER 497 (Mar. 2006). In those opinions, the Court interpreted the extent of knowledge (of both damages and the "other facts" required by Section 14(a)) required before the "starting date" accrues, and, based on my

reading of the various opinions that appear at that citation, I believe the English law takes a restrictive view of the statute's tolling provision. As stated by Lord Nicholls of Birkenhead, "knowledge [for purposes of the statute] does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim for the proposed defendant, taking advice, and collecting evidence: Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice. In other words, the claimant must know enough for it to be reasonable to begin to investigate further.... [I]t is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularized statement of claim." Id. at 4.

Moreover, as stated by Lord Brown of Eaton-under-Haywood, who asks "[i]s it enough that Mr. Haward [the plaintiff] knew, as plainly he did, that Fawcetts [the defendant] advised him that this was a sound and suitable investment...and that it was on the basis of this advice that he went ahead with it? Or did he need to know more than that, and if so, what more? Clearly, for time to start running, he did not have to know that Fawcetts had, as a matter of law, acted negligently in the giving of their advice. [Emphasis

added.] On the facts of this case the question ultimately seems to me to come down to this: to set time running that Mr. Haward needed to know not only that the investment was made on Fawcetts' advice but also that the advice had not been based on the kind of investigations which much necessarily be undertaken before any such advice can be reliably tendered... [T]o my mind it must fail if anything more is required than that Mr. Haward knew that his loss might well have resulted from an investment made on Fawcetts's advice." Id.at 20. "True [under this approach] the claimant knows nothing beyond the fact that his advisors led him into what turned out to be a bad investment; he does not know...that he has a justifiable complaint against his advisers. But he surely knows enough (constructive knowledge aside) to realise that there is a real possibility of his damage having been caused by some flaws or inadequacty in his adivser's investment advice, and enough therefore to start an investigation in the possibility, which §14(a) of the 1980 Act then gives him three years to complete." Id.

As may have been suggested by my questions at oral argument, given what the new members of the Statek board and Statek itself knew in 1996 about Johnston and Spillane being sophisticated diverters of funds and, further, that Coudert had been advising them, including in respect of setting up a foreign subsidiary and buying an apartment London, it is very tempting, even in a motion to dismiss context, to conclude that

under the interpretations of the tolling provision of the British Limitations Act of 1980 discussed above, the "starting time" occurred in and around 1996, the date that Coudert allegedly was negligent, and not a later date when it was established that Coudert had not provided all of the files and information that was requested in 1996. I say that also because the amended complaint itself notes that the trustee appointed in Mr. Johnston's English bankruptcy case almost immediately started to pursue discovery on October 22, 2002, first informally and then formally, of Coudert very shortly after his October 2, 2002 appointment and before any additional, new files or other information were provided by Coudert on November 4, 2002. (Statek's Connecticut state court action against Coudert was commenced on October 28, 2005.)

However, I believe that on a motion to dismiss that inquiry is precluded. See McKenna, 386 F.3d 436, and should await further factual development based upon what was known or should have been understood by Statek starting in 1996, although I do believe it is very clearly something that could be the subject for a motion for summary judgment.

So again, the only basis in this procedural posture for dismissing the negligence claims (and that would include a negligence claim with respect to the $43,000.00), would be based upon the applicability of the New York borrowing statute and, if federal law applied, New York's statute of limitations.

Counsel for the plan administrator should submit an order consistent with this ruling.